PUBLIC PROSECUTOR v. SEOW BOON HOOI

[A. Cr. J. (Suffian J.) October 28, 1962]

[Alor Star — Criminal Appeal No. 17 of 1962]

Gaming — Distributing "tikam board" to shopkeepers — Whether assisting — Carrying on a public lottery — Common Gaming Houses Ordinance, 1953, s.4(1)(c).

The respondent was acquitted and discharged by the learned Magistrate on a charge of assisting in the carrying on a public lottery, contrary to section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. The evidence disclosed that he distributed "tikam boards" to a number of shopkeepers who in turn allowed members of the public to try their luck by buying little packets stuck to these boards only some of which contained numbers corresponding to numbered prize objects which also appeared on these boards. On appeal by the prosecution,

Held: in the circumstances the accused had assisted in the carrying on a public lottery, and it was immaterial who actually carried on the public lottery.

MAGISTRATE'S CRIMINAL APPEAL.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the appellant.

Lim Cheng Poh for the respondent.

Suffian J.: The accused was charged with assisting on the 8th September, 1961, at Jalan Dewa, Sungei Patani, in carrying on a public lottery, contrary to section 4(1)(c) of the Common Gaming Houses Ordinance, No. 26 of 1953.

The evidence for the prosecution as accepted by the learned Magistrate was as follows. Mr. Joginda Singh, O.C.C.I., Kedah/Perlis, was having lunch with four other police officers at a shop in Sungei Patani. While at lunch they saw the accused arrive in van No. P.C. 345 driven by another person, DW2. From where Mr. Joginda Singh was, he saw a large number of tikam boards in the van. He saw the accused take one into the next door shop, emerge and drive off in the van. The police officers followed him as he went to various places in the town. Eventually the van stopped near a stall kept by PW6. The accused went to the stall, spoke to PW6 and handed a tikam board to him. There were other tikam boards in the stall which PW6 had previously bought from the accused.

After the accused's departure, Mr. Joginda Singh went to PW6's stall and tried his luck at one of the tikam boards. A tikam board consists of an oblong stiff cardboard, approximately 2′ x 1′3″ in size. On about 90% of its surface are stuck various objects with different numbers. On the rest of its surface at the bottom are little packets, only some of which contained numbers. After a conversation with PW6, Mr. Joginda Singh paid him 10 cents and was allowed to select two packets. He selected two packets. None of them contained a number corresponding to the numbers stuck on the objects above, so he won no prize. He tried a third time and this time he was lucky. He won a ball map toy, the number on which corresponded to the number in the third packet he had picked out. Apparently he paid nothing for this chance but in my view nothing turned on this.

On the above evidence the learned Magistrate was, in my judgment, right in calling upon the accused for his defence.

At the end of the case, however, after the accused had given his evidence and had called the driver of his van in support, the learned Magistrate acquitted and discharged the accused.

The Public Prosecutor appealed.

In my judgment this appeal should be allowed.

The accused said that he worked for a company which instructed him to distribute these tikam boards and he only distributed them. His driver said that each board was sold for $8.50 but neither he nor the accused nor the company allowed members of the public to buy the little packets. Only the shopkeepers sold them to the public. He also said that the accused was himself the owner of the van and the towkay of the company and that the accused had been distributing these boards for about seven months and he had supplied PW6. The prices for the boards were fixed by the accused.

Applying section 4(1)(c) and the definitions of "lottery" and "public lottery" in section 2(1), there are four essential ingredients of this offence.

(a) the accused was assisting in carrying on;
(b) a game, method or device whereby money or money's worth is distributed;
(c) in any manner depending upon chance; and
(d) the public or any class of the public has or may have access to the game, method or device.

According to the presumption in the definition of "public lottery", ingredient (d) is presumed and the onus lies on the accused to prove that the public has no access to the lottery.

Much time was taken by arguments about section 11 but in my view the facts necessary to give rise to the presumption under it had never been proved and so the presumption never arose and likewise the question whether that presumption was ever rebutted.

Defence counsel submitted that Mr. Joginda Singh was not an expert qualified to prove the lottery. In my judgment Mr. Joginda Singh's description of the game played in this case, even if it had been given by a schoolboy was sufficient to prove ingredients (b) and (c) above.

Defence counsel also submitted that mere possession, which was admitted, of these boards did not constitute a criminal offence. The accused merely distributed these boards. What happened afterwards was no concern of his. He was (it was submitted) in the same position as a man who made and sold playing cards. If the purchaser of such playing cards were to gamble in

a public place, their seller could not be criminally liable. But in my view here the facts are quite different. Some of the objects used as prizes on these tikam boards displayed quite openly money ranging from 5 cent coins to dollar notes. They were obviously meant to entice gullible members of the public. They had not been sold to a father who wanted to use them at a children's party where his young guests would be invited to have a free lucky dip. They had been sold to PW6 who had a stall in a public place in a sizeable town. Similar boards had been sold to other shopkeepers. PW6 certainly allowed members of the public to try their luck. In these circumstances it is quite clear to me that the accused had assisted in carrying on this public lottery, it being immaterial who actually carried on the public lottery.

For these reasons I set aside the order acquitting and discharging the accused and for it I substitute an order finding him guilty and convicting him of the offence charged.

As to sentence, I fine the accused $500. On his application I allow him to pay $100 today, the rest in monthly instalments of $100, payable as to the first instalment on 1st December, 1962 and as to the rest on the 1st of each subsequent month. The exhibits are confiscated.

Acquittal and discharge set aside.

Solicitors: *Pillai, Lim, Lee & Hwang.*

INNAYA & ANOR. v. LOMBARD ACCEPTANCE (MALAYA) LTD.

[A. C. J. (Hepworth J.) November 30, 1962]

[Penang — Civil Appeal No. 5 of 1962]

Hire-Purchase — Car in possession of third party — Re-possession by owner on default of instalments — More than 1/3rd of hire-purchase price paid — Application of English Hire-Purchase Act, 1938 — Whether re-possession wrongful — Hire-Purchase Act, 1938, ss.11, 21 — Civil Law Ordinance, 1956, ss.3, 5.

Practice and Procedure — Ground of appeal not pleaded in court below — Whether ground open on appeal.

The 1st appellant was the hirer of a motor-car from the owner, the respondents, under a hire-purchase agreement and under which the 2nd appellant was the guarantor. After seven monthly instalments had been paid, the 1st appellant defaulted in payment. The respondents repossessed the car which had been sent for repairs, after paying the repairer the costs of the repairs. The respondents then brought an action for the recovery of $1,642.79 being the sum outstanding under the hire-purchase agreement.

In this appeal the appellants contended that by virtue of sections 3 and 5 of the Civil Law Ordinance, 1956, the English Hire-Purchase Act, 1938 applied here and that the re-possession was wrongful as being in contravention of section 11 of the Act because more than one-third of the amount of the hire-purchase price had been paid by the appellants and that therefore the respondents had no right to recover any sum of money in addition.

Held: (1) this ground of appeal was not pleaded and accordingly was not open to the appellants;

(2) even if the English Hire-Purchase Act applied, section 11 of the said Act has no application when the goods are in the hands of a third party at the time of seizure.

Case referred to:—

(1) *Cooden Engineering Co. Ltd.* v. *Stamford* [1952] 2 All E.R., 915.

CIVIL APPEAL.

Jag-Jit Singh for the appellants.

K. E. Hilborne (*Khoo Keat Siew*) with him for the respondents.

Cur. Adv. Vult.

Hepworth J.: This is an appeal from a judgment of the learned President, Sessions Court, Penang, awarding the plaintiffs/respondents the sum of $1,211.79 and costs and dismissing the defendants/appellants' counterclaim.

Briefly what had happened was this. The 1st appellant was the hirer of a motor car from the owners, the respondents, under a hire-purchase agreement under which the 2nd appellant was the guarantor. The hire-purchase agreement had been entered into on the 1st October, 1959, and 7 monthly instalments had been paid by August, 1960, by which time there were 3 instalments in arrear. In August, 1960, the 1st appellant arranged with a garage in Alor Star, Lean Kooi Motors, to carry out certain repairs to this car, the cost of which amounted to $351.59. The car was in this garage for a month and the 1st appellant did nothing about collecting it or paying the repair charges due. The respondents learned that the car was in this garage and re-possessed the car after paying the garage the cost of the repairs.

The respondents then claimed the sum of $1,642.79, which was the amount they alleged to be outstanding and due under the hire-purchase agreement.

The learned President held that the transaction was a hire-purchase transaction and that the document concerned, P.5, was a hire-purchase agreement. I see no reason to disagree with him as to this and accordingly, although a number of points were argued both in the Court below and on appeal, the only ground of appeal of substance was that the transaction was governed by English law and that as a result, as the respondents had retaken the car, they had no right to recover any sum of money in addition.

The appellants' argument was that the hire-purchase agreement provided that if more than one-third of the hire-purchase price had been paid by the hirer, then unless the hirer had himself put an end to the agreement, the owner could not take the car back from the hirer without the consent of the hirer unless the owner obtained an order of the Court. Those provisions were however only to take effect if required by law and otherwise were to be void.

The appellants argue that by virtue of the Civil Law Ordinance, 1956, section 3(1) and (2) and section 5(1), the Hire-Purchase Act, 1938, of